DEVELOPMENT & COMMERCIAL BANK BHD.

v.

CHEAH THEAM SWEE

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. C2575 OF 1984]
1 MARCH 1989

CIVIL PROCEDURE: *Application to set aside default judgment - Judgment entered when defendant and Counsel were absent at hearing of application for summary judgment - Whether explanation for absence at hearing satisfactory - Whether any merits in the defence - Whether admission of debt by defendant - Whether notices issued by Controller of Foreign Exchange constituted subsidiary legislation - Whether trial necessary.*

The plaintiff filed their writ of summons and statement of claim against the defendant claiming a sum of RM20,050,015.92. At the O. 14 hearing neither the defendant nor his Counsel appeared and the Senior Assistant Registrar gave leave to enter judgment against the defendant. The defendant is now applying to set aside this order and for unconditional leave to defend the action.

The defendant conceded that he made a mistake in drawing inferences from the plaintiffs' letters to mean that the plaintiffs would realise certain securities in order to satisfy their claim and could not levy execution against him. He therefore did not instruct his solicitors to file papers or to appear in the O. 14 proceedings.

The defendant conceded that he was a permanent resident of Singapore when the loan was given to him. As such, the whole transaction and grant of the loan was contrary to s. 8 of the Exchange Control Act 1953, as no permission of the Controller of Foreign Exchange had been obtained. The plaintiff averred that the defendant, for exchange control purposes was a resident of Malaysia and no consent or permission was required in order to enter into the loan agreement with him. It was not in dispute that the defendant was a citizen of Malaysia. It was contended by the plaintiff that for the purpose of s. 8 of the Exchange Control Act 1953 a citizen of Malaysia is a resident in Malaysia. The plaintiff relied on notices issued by the Controller of Foreign Exchange. The defendant averred that the Controller had not given directions that for all purposes of the Exchange Control Act 1953 a citizen of Malaysia is to be treated as a resident of Malaysia. He went on to state that there was no exchange control notice providing that a citizen of Malaysia is to be treated as a resident of Malaysia for the purpose of the grant of a loan in Ringgit Malaysia by a bank in Malaysia. It was also contented for the defendant that the notices were inadmissible as these notices were not orders or statutory instruments or subsidiary legislation. He also claimed that the notices were not signed by the authorised officer, they did not indicate under which provision of the Exchange Control Act 1953 they were issued; and they were not published in the gazette.

It was also averred by the plaintiff in their statement of claim that upon demand for repayment of the sum owing made by the plaintiff's solicitors, the defendant by his letter admitted liability to pay the plaintiff but the sums remain unpaid.

Held:

[1] The Court will have to be fully satisfied why the defendant was absent at the hearing of the O. 14 application. The defendant has failed to give satisfactory explanation for his absence at the hearing of the order O. 14 application. It was conceded that the defendant made a

mistake in drawing inferences from the letters. Since the defendant is a lawyer he should know what an O. 14 application was, and he should know the consequences if he or his solicitors did not attend the hearing of the application.

[2] Although the Court was not fully satisfied with the explanation given by the defendant for his non-attendance at the hearing, to dismiss the defendant's application on this ground alone is too drastic. This is only at the O. 14 stage. There has been no trial and no judgment on the merits. If the defendant failed to explain satisfactorily his absence at the hearing, the Court can order him to pay costs to the plaintiff if he succeeds in setting aside the judgment.

[3] The principle of setting aside judgment entered in the absence of the defendant under O. 14 r. 11 is the same principle as laid down in *Evans v. Bartlam.* Since the judgment was a regular judgment, the Court has to consider the question of merits.

[4] The question of where the defendant was resident at the material time is an issue which can only be decided at the trial.

[5] Whether a Malaysian citizen, residing abroad, is also a resident of Malaysia for the purpose of the Exchange Control Act 1953 is an important question of law which should be decided at the trial. There is also this question of construction of the notices issued by the Controller of Foreign Exchange which should be decided at the trial.

[6] The notices are subsidiary legislations as defined in s. 2 of the Interpretation Act 1976. Under the Interpretation Act it is not mandatory that these notices be published in the gazette before they come into force. There is no provision in the Exchange Control Act 1953 to say that the notices shall be made through publication in the *Gazette*. It is not necessary to publish the notice in the gazette to give them statutory effect. In view of s. 39(2) of the Exchange Control Act 1953, it is left entirely to the Controller to decide whether to state under which provision of the Act the notice is issued or whether to sign the notice or whether to publish the notice in the gazette. The notices exhibited to the affidavits of the parties are therefore admissible and valid.

[7] In the letter written by the defendant, he did not admit liability. He was writing about repayment to the plaintiff. Even if there was an admission of the debt in this case, in view of the serious question of law and facts to be tried, the plaintiff was not entitled to summary judgment against the defendant.

[Defendant's application allowed. Defendant to pay the costs of the application.]

Cases referred to:
Public Bank v. Hara Industries [1987] CLJ (Rep) 842
Savings and Investment Bank Ltd. v. Gasco [1984] 1 All ER 296
Evans v. Bartlam [1937] AC 473
Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat [1979] 1 MLJ 23
Low Boon Por v. Selangor Engineering Works [1971] 1 MLJ 124
Perwira Habib Bank Malaysia Bhd. v. Haji Abdullah bin Haji Sulaiman & Anor. [1985] CLJ (Rep) 639

Legislation referred to:
Exchange Control Act 1953, ss. 2, 8, 39(2), 43(2)
Interpretation Act 1967, ss. 2, 18(1)
Rules of the High Court 1980, O. 13 r. 9, O. 14 rr. 5, 11, O. 41 r. 6, 0. 42 r. 12
Rules of the Supreme Court 1957, O. 27 r. 3, O. 32 r. 6

Other source referred to:
Supreme Court Practice 1982, Vol. 1
Supreme Court Practice 1985, Vol. 1
Administrative Law of Malaysia and Singapore, (1980) p. 117

For the plaintiff - V. Pradhan; M/s. Skrine & Co.
For the defendant - V.K. Palasuntharam; M/s. Richard Talalla & Co.
For the Bank Negara - C. Dass; M/s. Shook Lin & Bok

JUDGMENT

Zakaria Yatim J:

This is an application by the defendant to set aside the order of the Senior Assistant Registrar made in chambers in the absence of the defendant and his solicitors on 8 February 1985 and the judgment dated 8 February 1985 entered pursuant to the leave granted the said order. The defendant also asks that leave be granted unconditionally to him to defend this action.

The plaintiff filed their writ of summons and statement of claim against the defendant on 27 July 1984. The plaintiff's claim against the defendant is for a sum of RM20,050,015.92 due as June 1984 with interest from June 20 thereon at 18% per annum with annual rests on the sum remaining unpaid pursuant to a written agreement and at 18% per annum with monthly rests on the sum remaining unpaid. The written agreement (hereinafter referred to as the "said agreement") was entered into between the plaintiff, the defendants and one Dato Abdullah on 26 October 1982. By the said agreement, the plaintiff, at the request of the defendant and Dato Abdullah agreed to grant a term loan of RM13,500,000 to the defendant to be repaid by the defendant with interest at the expiry of one year of the date of draw down of the loan which was on 27 October 1982. By a document of pledge dated 26 October 1982 made by Dato Abdullah the plaintiff obtained as continuing security for the repayment of the said loan a pledge of 699,850 shares at RM1 each in United Securities Sdn. Bhd. Secondly, at the request of the defendant, the plaintiff, as the defendant's banker, executed a guarantee on 17 March 1983 under the terms of which the plaintiff agreed to pay on demand any sum owing to Lee Wah Bank Ltd. by the defendant up to a limit of RM4,000,000. By a supplementary document of pledge dated 19 March 1983, Dato Abdullah agreed that the same shares would also be the plaintiff's security for any liability suffered by the plaintiff by reason of entering into the said guarantee. On 7 March 1984 the Lee Wah Bank wrote a letter to the plaintiff requesting payment of the sum of RM4,000,000 pursuant to the said guarantee. The plaintiff made payment of the said sum and now claims that they are entitled to repayment of the said sum together with interest. In the particulars of the plaintiff's statement of claim, the plaintiff is claiming, in respect of the letter of guarantee the sum of RM4,156,197.34 which is the amount of the guarantee plus accrued interest. In respect of the term loan, the plaintiff is claiming the amount of principal outstanding together with interest totalling RM15,893,818.58. According to the statement of claim, upon demand made by the plaintiff's solicitors in a letter dated 30 May 1980 for the repayment of the sums owing, the defendant by his letter dated 7 June 1984 admitted liability to pay the plaintiff but the sums owing remain unpaid.

The defendant, through his solicitors, entered appearance on 29 August 1984. On 22 September 1984, the plaintiff filed an application for leave to enter final judgment against the defendant for a sum of RM20,050,015.92 together with interest on (1) the sum of RM4,156,197.34 at the rate of 18% per annum with monthly rests; and (2) the sum of RM15,893,818.58 at the rate of 18% per annum with yearly rest from 20 June 1984 to the date of final payment and costs. The date of the hearing of the application was fixed on 8 February 1985 at 9.30 a.m. On that date the solicitor for the plaintiff was present before the Senior Assistant Registrar. The defendant and his solicitor were absent. The Senior Assistant Registrar gave judgment as prayed in the absence of the defendant and his solicitor. Hence the present application.

Before I proceed to consider the application, I should mention here that at the close of the hearing of the application, Mr. Pradhan made an oral application to amend the order and judgment obtained on 8 February 1985 by deleting the words "final judgment" and substituting thereof with the word "judgment". He made the application in the light of V.C. George J's decision in *Public Bank v. Hara Industries* [1987] CLJ (Rep) 842 at 844, where it was decided under O. 42 r. 12 of the Rules of the High Court, the Court is empowered only to grant interest at the rate of 8% per annum from the date of judgment to the date of realisation. Mr. Pradhan conceded that it was an error on the part of the plaintiff. Mr. Palasuntharam objected to the application to amend the judgment. Mr. Pradhan replied that the plaintiff had not deliberately attempted to enforce the judgment after being aware of the decision of the *Hara Industries* case. I allowed the oral application to amend the judgment dated 8 February 1985 and the order of the Senior Assistant Registrar given on the same date in the light of the circumstances of this case.

The present application, is made under O. 14 The question that arises here is whether the defendant has to explain to the Court why he or his solicitor was absent at the hearing before the Senior Assistant Registrar on 8 February 1985 and whether the Court has to be fully satisfied with the explanation. Mr. Pradhan, Counsel for the plaintiff, referred to the *Supreme Court Practice,* 1985 Vol. 1, p. 159, where it is stated, "The Court will wish to be fully satisfied as to the reason for the non-attendance at the hearing of the summons of the party against whom judgment was given under Order 14." According to Mr. Pradhan, this is a good proposition of law. He submitted that if the Court is not satisfied with the explanation, the application to set aside must be dismissed. If the Court is fully satisfied with the explanation it will then consider whether there are issues for trial. Mr. Palasuntharam, Counsel for the defendant submitted that the passage in the *Supreme Court Practice* quoted above is a wrong statement of the law. In support of his submission he cited *Savings and Investment Bank Ltd. v. Gasco* [1984] 1 All ER 296. At p. 301 of the report, Peter Gibson J pointed out the commentary in the *Supreme Court Practice,* 1982, Vol. 1, p. 104 on O. 41 r. 6 was not correct, *Gasco* case did not make any reference to the commentary on O. 14 quoted above.

On 9 July 1986, I made the ruling that the Court will have to be fully satisfied why the defendant was absent at the hearing of the O. 14 application. The passage in the *Supreme Court Practice* quoted above is an expression of opinion by the learned authors of the book and I adopt it as a good proposition of law. Recently there was a case before me where the situation was quite similar. In that case, *Perwira Habib Bank Malaysia Bhd. v. Yap Yeng Seng* [1989] 2 CLJ (Rep) 252, summary judgment was entered by the Senior Assistant Registrar against the defendant in the absence of the defendant and his solicitor. In that case I considered the reasons given by the defendant for his non-attendance at the hearing of the plaintiff's application for summary judgment and I was not satisfied with the explanation.

It is now necessary to consider the explanation given by the defendant in the present case for his non-attendance at the hearing before the Senior Assistant Registrar on 8 February 1985. In his affidavit affirmed on 8 May 1985, the defendant made the following averments in para. 16:

> With reference to paras. 8 and 9 of the statement of claim I state as follows:
>
> (a) the plaintiffs by their letter to me dated 28 March 1984 represented to me as follows: 'Please note that in the event that you fail to settle the said sum" (of RM15,312,024.68 owing on the term loan) 'and/or we have to pay the claim to Lee Wah Bank, we will hand this matter over to our solicitors to enforce our securities for the above mentioned

facilities.' A copy of the said letter dated 28 March 1964 is an exhibit hereto marked CTS4.

(b) the plaintiffs' solicitors Messrs Skrine & Co. by their letter to me dated 25 June 1984 on behalf of the plaintiffs, besides informing me that the 'amount owing as at 19 June 1984 is RM20,050,015.92' and that legal proceedings will be instituted against me, also represented to me as follows: 'Our clients will be also take steps to realise the securities given.' A copy of the said letter dated 25 June 1984 is an exhibit marked CTS5.

(c) the plaintiffs' solicitors by their subsequent undated letter on behalf of the plaintiffs to me before the issue of the writ of summons in this suit, besides informing me that they were proceeding to file an action against me, also represented to me that they were proceeding 'to take steps to sell the shares of United Securities Sdn. Bhd. pledged' to the plaintiffs. A copy of the said undated letter is an exhibit hereto marked CTS6.

In para. 17 of the same affidavit the defendant said, *inter alia*:

> Relying on the representations of the plaintiffs set out in para. 16 above I believe that the plaintiffs would sell the said 699,850 shares or part thereof and satisfy their claim fully and pay the balance of proceed to Dato Abdullah and that the plaintiffs could not levy execution against me on any judgment or order given in this suit. I therefore, did not instruct my then solicitors to file papers, or to appear before the learned Senior Assistant Registrar at the hearing to obtain leave in the O. 14 proceedings for me to defend against the plaintiffs' claim and to take out third party proceedings against Dato Abdullah..

Mr. Palasuntharam submitted that the defendant had made a mistake in drawing inference from the letters. He added, however, that there was satisfactory explanation as to why the defendant did not appear at the hearing. Mr. Pradhan argued that the defendant was told that he was going to be sued. According to him, the defendant acknowledged that he owed the plaintiff. He added that the defendant is a lawyer and he deliberately allowed judgment to go on default.

In my opinion the defendant has failed to give satisfactory explanation for his absence at the hearing of the O. 14 application. Mr. Palasuntharam indeed conceded that the defendant made a mistake in drawing inferences from the letters. Since the defendant is a lawyer he should know what O. 14 application was, and he should know the consequences, if he or his solicitors did not attend the hearing of the application.

Since the Court was not fully satisfied with the explanation given by the defendant for his non-attendance at the hearing, the question now is whether his application to set aside the judgment be dismissed as suggested by Mr. Pradhan. In my view to dismiss the defendant's application on this ground alone is too drastic. This is only an O. 14 stage. There has been no trial and no judgment on the merits. In *Evans v. Bartlam* [1937] AC 473 @ 480, Lord Atkin said:

> The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

Although *Evans v. Bartlam* was a case on judgment in default of appearance, in my view the principle quoted above applies equally to the present case. If the defendant failed to explain satisfactorily his absence at the hearing, the Court can order him to pay costs to the plaintiff if he succeeds in setting aside the judgment.

The next question to consider is what is the principle governing the setting aside of O. 14

judgment entered in the absence of the defendant, Mr. Palasuntharam submitted that the principle for setting aside judgment in default of appearance under O. 13 r. 9 applied to an application to set aside a default judgment under O. 14. He referred to a passage in the commentary to O. 14 r. 11 in the *Supreme Court Practice* (1985) at p. 159 where it is stated:

> As to the principles on which a judgment in default may be set aside, see nn. to O. 13 r. 9.

According to him the principle in *Evans v. Bartlam* is also the principle to set aside an O. 14 judgment. Mr. Pradhan, on the other hand, submitted that the principle under O. 13 r. 9 does not apply to an application to set aside O. 14 judgments. He said that O. 14 is a different situation from O. 13. He pointed out that *Evans v. Bartlam* was a case on O. 13 and not on O. 14.

In my opinion the principle under O. 13 r. 9 applies in the present case. The commentary to O. 13 r. 9 in the *Supreme Court Practice* (1965) at p. 127 states that O. 13 r. 9 "should be read with other rules conferring power on the Court to set aside or vary any judgment or proceedings, namely, setting aside judgment under O. 14 r. 11" I agree with the passage just quoted. The principle of setting aside judgment entered in the absence of the defendant under O. 14 r. 11 is therefore the same principle as laid down in *Evans v. Bartlam*. In *Yap Yeng Seng* case *supra*, I applied the same principle. Although *Evans v. Bartlam* has been cited many times in our Courts, I think, for the purpose of the present application it is necessary to quote below the well known passage (p. 480) in the speech of Lord Atkin:

> The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he had a *prima facie* defence.

In *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat* [1979] 1 MLJ 23 at 24, the Federal Court stated the principle in the following words:

> It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits.

The defendant did not seriously challenge that the judgment was an irregular judgment. It is therefore, not necessary for me to consider this question. In any case, I think the judgment was a regular judgment.

I shall now consider the question of merits.

It is relevant to mention here that in the course of the hearing of this application the plaintiff filed an affidavit affirmed by the senior manager of the plaintiff on 23 November 1985. Mr. Palasuntharam objected to two letters exhibited to the said affidavit. The first letter dated 19 November 1985, was written by the plaintiff to Bank Negara. In that letter the plaintiff asked Bank Negara to "confirm whether for the purposes of the Exchange Control Act 1953 with particular reference to s. 8 and ECM3 ('External Account'), a citizen of Malaysia is presumed to be a resident of Malaysia unless otherwise designated by the Controller of Foreign Exchange." On 21 November 1985, Bank Negara replied the plaintiff's letter. In that letter Bank Negara wrote, "For the purpose of s. 8 of the Exchange Control Act 1953... a citizen of Malaysia is deemed to be a resident of Malaysia, unless the Controller of Foreign Exchange specifically directs that a particular citizen of Malaysia is to be treated as resident outside Malaysia." Mr. Palasuntharam submitted that in the letter the department of Foreign Exchange of Bank Negara was giving evidence on the construction of s. 8 of the Exchange Control

Act 1953. Mr. Pradhan submitted that the two letters did not deal with the construction of the Exchange Control Act 1953. On 5 December 1985, I made a written ruling on this point. In that ruling I said that the two letters did not come within the meaning of O. 41 r. 5 of the Rules of the High Court 1980. the two letters were inadmissible for the purpose of the present application (the text of my ruling given on 5 December 1985 is marked as encl. (29) in the Court file).

The defendant's main contention in this application was that on 26 October 1982 when the loan agreement was concluded between the plaintiff, the defendant and Dato' Abdullah, and subsequently when the plaintiff paid to the defendant the sum of RM13,500,000 to the defendant, the defendant was a permanent resident in the Republic of Singapore. It is not in dispute that the sum of RM13,000,000 was paid to the defendant by cashiers order serial no. 007038. This is stated in a letter from the plaintiff to the defendant dated 27 October 1982 which is exhibited to the affidavit of Senator Alexander Y.L. Lee affirmed on 4 September 1985. According to the defendant the whole transaction and the grant of the loan of RM4,000,000 to him was contrary to s. 8 of the Exchange Control Act 1953. For the propose of convenience I shall quote s. 8 of the Act:

> Except with the permission of the Controller, no person shall do any of the following things in Malaysia:
>
> (a) make any payment to or for the credit of a person resident outside the scheduled territories;
>
> (b) make any payment to or for the credit of a person resident in the scheduled territories by order or on behalf of a person resident outside the scheduled territories; or
>
> (c) place any sum to the credit of any person resident outside the scheduled territories: provided that where a person resident outside the scheduled territories has paid a sum in or towards the satisfaction of a debt due from him, para. (c) shall not prohibit the acknowledgement or recording of the payment.

The first question to consider is whether the defendant was a resident outside the scheduled territories. Under s. 2 of the Act and under the first schedule, the term "scheduled territories" means Malaysia. In his affidavit affirmed on 4 June 1985, the defendant averred that from 15 August 1970 he had been a permanent resident of the Republic of Singapore. Exhibited to the affidavit is a copy of an entry permit issued by the Government of the Republic of Singapore on 15 August 1970, which shows that the defendant was allowed to enter and remain in Singapore. The plaintiff, in their affidavit affirmed on 26 June 1985 averred that they were never informed by the defendant that he was a resident in or a permanent resident of Singapore. The plaintiff added that had they known that the defendant was a resident of Singapore within the meaning of and subject to the restrictions of the Exchange Control Act 1953 they would have obtained the permission of the Controller of Foreign Exchange before advancing the sum to the defendant. The defendant, in a subsequent affidavit affirmed on 26 June 1985, replied to the plaintiff's affidavits. In that affidavit, the defendant stated that the plaintiff knew that he was resident in and a permanent resident of Singapore. In this respect the defendant referred to a letter dated 28 March 1984 written by the plaintiff to the defendant, which letter was exhibited to the defendant's affidavit affirmed on 8 May 1985. That letter was addressed to the defendant at 243, Jalan Pekeliling Kuala Lumpur and at 37, Ford Avenue, Singapore 1026. According to the defendant he was resident at 37, Ford Avenue, Singapore 1026 from August 1970 to January 1982. From February 1982 he was resident at no. 22, Woolerton Drive, Singapore 1025. According to the defendant, in one of the discussions between the plaintiff and the defendant regarding the loan, the plaintiff's

managing director, Senator Alexander Y.L. Lee asked the defendant whether the defendant was still a citizen of Malaysia. The defendant replied that he was a citizen of Malaysia but was a resident of Singapore. The defendant went on to state that an official of the plaintiff requested him to furnish a Malaysian address which the defendant did. In the application form for the loan, the defendant wrote the Kuala Lumpur address and the Singapore address 27, Ford Avenue Singapore in the box under "present address. The application form is exhibited to the affidavit of the plaintiff affirmed on 4 September 1985. The plaintiff in the same affidavit, averred that the defendant, for exchange control purposes was a resident of Malaysia and no consent or permission was required in order to enter the loan agreement with him. In my opinion the question of where the defendant was resident at the material time is an issue which can only be decided at the trial.

It is not in dispute that at the material times the defendant was a citizen of Malaysia. In the affidavit of Mr. Wu Foong Chung, the manager of the plaintiff, affirmed on 4 September 1985, it was stated that "for exchange control purposes, a citizen of Malaysia is regarded as a resident of Malaysia." In his affidavit affirmed on the same date, Senator Alexander Y.L. Lee averred "that for Exchange Control purposes the defendant was a resident of Malaysia by reason of his citizenship." Senator Alexander Y.L. Lee was relying on two notices issued by the Controller of Foreign Exchange, Bank Negara dated 6 March 1982 which was exhibited to his affidavit. These notices were ECM3 and ECM15 Senator Alexander Lee went on to state in his affidavit that para. 2.4 (a) of ECM15 defined "resident" as meaning citizen of Malaysia. He added:

> Both Form ECM3 and Form ECM15 were in force on the date when the defendant applied for his loan and are still in force. They both make it clear that for Exchange Control purposes the defendant was a resident of his citizenship. The transactions between the plaintiff and the defendant were not, therefore illegal transactions and were not prohibited by the Act.

In a subsequent affidavit affirmed by the senior manager of the plaintiff on 23 November 1985 it was again averred that for the purpose of s. 8 of the Exchange Control Act 1953 a citizen of Malaysia is a resident in Malaysia. The deponent was relying on ECM3 and ECM4. In para. 5 of the same affidavit, the deponent stated:

> I am advised by the bank's solicitors and verily believe that the Exchange Control Act 1953 does not prohibit the grant of a loan in Ringgit Malaysia in Malaysia to a citizen of Malaysia nor the payment of money by a cashier's order intended to be paid into the payee's account pursuant to the granting of the loan. Neither does it prohibit the giving of a guarantee in Malaysia for the benefit of a Malaysian citizen nor does it prohibit any payment made in Ringgit Malaysia in Malaysia pursuant to that guarantee.

The defendant, in his affidavit affirmed on 6 November 1985, averred that the Controller of Foreign Exchange had not given directions that for all purposes of the Exchange Control Act 1953 a citizen of Malaysia is to be treated as a resident of Malaysia. He went on to state that there was no exchange control notice providing that "a citizen of Malaysia is to be treated as a resident of Malaysia for the purpose of the grant of a loan in Ringgit Malaysia by a bank in Malaysia."

I shall now examine the notices issued by the Exchange Control Department, which have been relied upon the plaintiff namely, ECM3, ECM4 and ECM15. I shall begin with ECM15 which deals with "loans in foreign currency to residents and accounts in foreign currency of non-residents." Para. 1 of the notice "sets out the terms and conditions under which banks may lend in foreign currency to residents." The notice went on to state that for purpose of ECM15, 'resident' means a citizen of Malaysia. It will be noted that ECM15 is concerned

only with loans in foreign currency. In the present case, the loan of RM13.5 million was granted by the plaintiff to the defendant in Ringgit Malaysia and not in foreign currency. I produce below an extract of a letter written by the plaintiff to the defendant on 27 October 1982:

Re: Term Loan of Ringgit Malaysia 13.5 million.

We refer to the above.

Enclosed herewith is our cashier's order serial no. 007038 for RM13,500,000 being the full and final release of the above loan with us.

The loan is for 1 year from date of full draw. Kindly acknowledge receipt of the above by signing and returning to us the duplicate of this letter.

Yours faithfully, Acknowledged receipt

Sgd/- Sgd/-

Lai Nan Kian, Date: 27 October 1982.
Manager,
Head Office Loans.

It appears, that ECM15 does not apply to the present case. It appears also that the definition of 'resident' in the notice applies in cases of, loans in foreign currency to residents.

I now turn to ECM4. The title of this notice is "General Payments." Paragraph 1 of the notice states that "the permission of the controller is required before a payment may be made by a resident of Malaysia to a resident outside the scheduled territories." This notice sets out the requirement of the law under the Exchange Control Act 1953. There is no evidence in the plaintiff affidavits that the permission of the Controller of the Exchange Control department had been sought by the plaintiff respect of the loan transactions in the present case. In the plaintiff's affidavit affirmed on 4 September 1985, para. 3(c) it is indeed stated that "...no consent or permission was required in order to enter into the loan agreement with him (the defendant) or to make payment of the loan monies to him or to grant him the letter of guarantee facility or to pay to Lee Wah Bank Ltd. the amount payable under the guarantee..." (words in brackets added) para. 6 of ECM4 provides that payments to external accounts maintained by residents of countries outside Malaysia are dealt with in ECM3.

The title of ECM3 is "External Accounts." Paragraph 1 of ECM3 states that "An External Account is Malaysian Dollar account of a resident of a country outside Malaysia maintained with an authorised bank in Malaysia." Paragraph 4 of the notice states that no external account shall be opened for a citizen of Malaysia. In my view, this notice does not apply to the present case since, it is not in dispute that the defendant is a Malaysian citizen.

Under s. 43(2) of the Act the Controller is given the power to give directions declaring that for all or any of the purposes of the Act a person is to be treated as a resident or not as may be specified in the directions. It is pursuant to this provision of the Act that ECM3 and ECM15 were issued for specific purposes. The question that arises here, is whether the plaintiff can rely on a particular paragraph in the notices (ECM3 and ECM15), and apply the paragraph to a situation entirely different from the situations intended in those notices. In my view this is a question of construction of the ECM notices which should be decided at the trial. The important question which should be decided at the trial is whether a Malaysian citizen, residing abroad, is also a resident of Malaysia for the purpose of the Exchange Control Act

1953. This is a question of law. See *Bank Bumiputra Malaysia v. Majlis Amanah Ra'ayat, supra.*

Mr. Pradhan submitted that the defendant would be a permanent resident of Singapore as well as a resident of Malaysia. Senator Alexander Lee, in the same affidavit averred that "for purposes of the Exchange Control Act 1953, the defendant had at all material times dual residence." The defendant in his affidavit affirmed on 6 November 1985 stated:

> I am advised by my solicitor and I, therefore, state that for the purpose of the grant of a loan in Ringgit Malaysia to a citizen of Malaysia by a bank in Malaysia the Exchange Control Act 1953 and any direction or notice issued by the Controller of Foreign Exchange under that Act do not recognize that a citizen of Malaysia can have a dual residence in the sense of a residence in a country other than Malaysia and residence in Malaysia: residence in one of the countries only is possible to be recognised for the said purpose under the said law's.

Assuming that the defendant was a resident of Malaysia and a permanent resident in Singapore, it seems to me, this is again a question of the interpretation of the Exchange Control Act 1953. This is a question of law which should be decided at the trial. *Bank Bumiputra Malaysia v. Majlis Amanah Ra'ayat (supra).*

The next question to consider is whether the ECM notices exhibited to the affidavits filed by the plaintiff and the defendant are admissible for the purpose of the present application Mr. Palasuntharam objected to all these ECM notices on the ground that they were inadmissible. He submitted that these notices were not "orders" or statutory instruments or subsidiary legislations. According to him, these ECM notices were not signed by the authorised officer; they did not indicate under which provision of the Exchange Control Act 1953 they were issued; and they were not published in the gazette.

Mr. C. Dass, counsel for Bank Negara submitted that the ECM notices were directions with statutory force because they were made under the authority of a statute or they could be called instruments made under statutory authority. He told the Court that these notices are subsidiary legislations and it is not necessary for them to be published in the gazette before they come into force.

It is clear that under the Control Act, the controller is given the power to give directions. The manner in which the directions are to be given is provided in s. 39(2) of the Act. All the ECM notices exhibited to the affidavits filed by the plaintiff and the defendant are directions made in accordance with s. 39(2). I agree with Mr. C. Dass that these ECM notices are subsidiary legislations as defined in s. 2 of the Interpretation Act 1967. Under the Interpretation Act it is not mandatory that these ECM notices be published in the gazette before they come into force. There is no provision in the Exchange Control Act 1953 to say that the notices shall be made through publication in the gazette. See M.P. Jain, *Administrative Law of Malaysia and Singapore*, (1980) p. 117. Section 18(1)(c) of the Interpretation Act 1967 provides that subsidiary legislations "should be published as and when necessary." In my opinion, it is not necessary to publish the notices in the gazette to give them statutory effect. Section 39(2) of the Exchange Control Act 1953 clearly provides that any direction given under the Act "shall be given ...in such manner as the Controller thinks appropriate, and if so given **shall be valid for all purposes"** [Emphasis Added]. In view of this provision, it is left entirely to the Controller to decide whether to state under which provision of the Act the notice is issued or whether to sign the notice or whether to publish the notice in the gazette. In my judgment the ECM notices exhibited to the affidavits of the parties in this application are admissible and valid.

Mr. Palasuntharam's objection to the admissibility of the ECM notices has, therefore, no basis. But as I have already stated, there are triable issues in this case. The plaintiff, in their statement of claim averred that upon demand for repayment of the sums owing made by the plaintiff's solicitors in their letter dated 30 May 1984, the defendant by his letter dated 7 June 1984 "admitted liability to pay the plaintiff" but the sums remained unpaid. The letter relied upon by the plaintiff is reproduced below:

Cheah Theam Swee
243 Jalan Tun Razak
Kuala Lumpur 17-01.

1 June 1984

Your Ref: VP/pa/88907.2/84

M/s. Skrine & Co.,
Straits Trading Building **By Hand**
4, Leboh Pasar Besar,
Kuala Lumpur 01-02

Dear Sirs,

Re: Outstanding Sum to Development & Commercial Bank Berhad.

I have your letter dated 30 May 1984. I shall be grateful if you will kindly convey the following to your client.

The necessity of repaying your client is something I do not deny and it occupies priority in my affairs. I had on 11 April 1984 written to your client indicating that refinancing is being sought and or sale of the shares now by pledged with your client is being negotiated. As you know, these things take time. Efforts made to-date have enabled me to say that the matter has reached a fairly good stage with regard to the financing of the project connected with the shares held by your client. In this regard, I enclose herewith a copy of a letter from MBF-Blount, dated 4 June 1984, which is self-explanatory and in fact, will show the progress of the business.

As the above is being put together, the buyer for the shares has been actively working out and negotiating an offer for us, I trust you will impress upon your client that any action taken against me and attracting embarrassing publicity at stage will, no doubt, prejudice the progress now at hand and very likely cause the entire exercise to break down - what then? Forced sale, which is usually untimely, is surely not the answer and will only result in letting some other person or company get the assets cheap. In that event, it will cause very high degree of loss and damage to me and Dato' Abdullah. I sincerely believe that it is not the intention of your client to put us out of business. I would say the matter is getting close (in the context of time needed for such business) to a very nice business solution and I shall be very much obliged, therefore, if you could request your client to look at the matter on a business approach and let me and Dato Abdullah do the business and to repay your client. I had also made a request to your client to reprogramme the loans so that we remain in business. I shall keep you informed from time to time regarding progress of the matter.

Yours faithfully,

c.c. Dato Abdullah Mohamed
33rd Floor, Menara Promet,
Jalan Sultan Ismail,
Kuala Lumpur,

The defendant, in his affidavit affirmed on 4 June 1985 stated that he was not liable to pay the plaintiff the sum of RM20,050,015.92 or any part thereof or any interest claimed in the statement of claim.

It will be noted that in the letter quoted above the defendant did not admit liability. He was writing about repayment and that he and Datuk Abdullah would 'do the business to repay" the plaintiff. Even if there is an admission of the debt in this case, in view of the serious questions of law and facts to be tried, the plaintiff is not entitled to a summary judgment against the defendant. See *Low Boon Por v. Selangor Engineering Works* [1971] 1 MLJ 124 and *Perwira Habib Bank Malaysia Bhd. v. Haji Abdullah bin Haji Sulaiman & Anor.* [1985] CLJ (Rep) 639. *Low Boon Por's* case was concerned with judgment on admission of facts under O. 32 r. 6 of the former Rules of the Supreme Court 1957 and *Hj. Abdullah* case was concerned with O. 27 r. 3. Although these two cases were not cases on summary judgment under O. 14, in my view the principle laid down in the two cases are applicable to the present case.

For the reasons stated above, I allow the defendant's application and set aside the judgment entered against him on 8 February 1985. The defendant is given unconditional leave to defend the action. He will file his defence within three weeks from the date of this judgment. the defendant will pay the plaintiff the costs of this application to be taxed by the Senior Assistant Registrar and paid forthwith.

Also found at [1989] 2 CLJ 809